Best Western City View Motor Inn *and* New York Hotel and Motel Trades Council, AFL–CIO. Case 29–RC–8643

January 28, 1999

SUPPLEMENTAL DECISION AND ORDER REMANDING

BY MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

On July 27, 1998, the National Labor Relations Board issued a Decision and Order Remanding,[1] in which it directed the Regional Director to prepare a supplemental decision concerning the nature and validity of the proof of service submitted by the Employer of the subpoena allegedly served on Sartaj Khan on September 6, 1996, in connection with a hearing on objections to the conduct of an election held August 2, 1996, and for such further proceedings as the Regional Director deemed appropriate.[2] The Board has considered the Regional Director's Supplemental Decision on Objections in light of the exceptions and brief, and finds that the case should be remanded for further proceedings for the reasons set forth below.

As noted in the Board's prior decision in this case, the Employer contends that agents of the Petitioner engaged in objectionable conduct by visiting employees Mahmood Khan Shah (Shah) and Sartaj Khan (Khan) at their homes prior to the election and, inter alia, threatening to "create trouble" for them if they did not vote for the Petitioner. A hearing was held concerning this objection on September 6 and 13 and December 2, 1996.[3] In support of this allegation, the Employer presented affidavits by the two employees but was unable to procure their attendance at the hearing.[4] The Employer requested that the Regional Director institute subpoena enforcement proceedings with respect to both witnesses.

The Regional Director declined to institute subpoena enforcement proceedings with respect to Khan, apparently on the grounds that the Employer failed to demonstrate that it had properly served a subpoena on him.[5] In its prior decision, the Board noted that the record was unclear with respect to the nature of the evidence submitted by the Employer to show proof of service. Specifically, in light of the Employer's exceptions, it was unclear whether the Employer had submitted a certification of service on Khan or copies of the postal return receipt card, which the Employer had not received when the hearing closed. *Best Western City View Motor Inn,* supra, at 1186. Accordingly, the Board remanded this proceeding for the Regional Director to determine the nature and sufficiency of whatever evidence the Employer had submitted as proof of service for the Khan subpoena.

In a supplemental decision following the Board's remand, the Regional Director found that the Employer had timely submitted to the Region an attorney's affirmation of service for the subpoena served on Khan, but that the hearing officer erroneously failed to forward this document to the reporting service for inclusion as an exhibit in the record.[6] The Regional Director also found that the Employer had not submitted a postal return receipt card for the Khan subpoena. On the basis of these facts, which are undisputed, the Regional Director concluded that the Employer had failed to establish that it had served the subpoena on Khan. The Regional Director noted that the Employer had submitted no proof that the subpoena mailed to Khan was actually delivered to him, and had not submitted the postal return receipt card for Khan.[7] The Regional Director thus implicitly found that the attorney's affirmation of service did not constitute proof of service under the Board's Rules and Regulations. We disagree.

As noted above, the Employer submitted as proof of service an attorney's affirmation of service, which stated that the Employer's attorney had mailed the subpoena to Khan by certified mail, return receipt requested. The affirmation of service also specified the date and method of mailing and the address to which the subpoena was mailed. Courts routinely accept equivalent certifications

[1] 325 NLRB 1186.

[2] The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 16 for and 4 against the Petitioner, with 7 challenged ballots, an insufficient number to affect the results.

[3] All dates hereafter are in 1996.

[4] The affidavits further aver that the two employees discussed the alleged threats with several other eligible voters. The union agents alleged to have made the threatening remarks denied having made the statements attributed to them by Shah and Khan. Neither Khan nor Shah was employed by the Employer as of the date of the hearing.

[5] With respect to the subpoena served on Shah, the Regional Director instituted subpoena enforcement proceedings in the United States District Court for the Eastern District of New York. On November 22, the court issued an Order directing Shah to appear before the Board's hearing officer on December 2 and testify in this proceeding. Although properly served with a copy of the court's Order, Shah did not appear at the hearing on December 2. In its prior decision in this case, the Board affirmed the Regional Director's decision not to initiate contempt proceedings against Shah for the reasons stated therein. *Best Western City View Motor Inn,* supra, 325 NLRB 1186, 1187 (Member Hurtgen dissenting in pertinent part).

[6] The document submitted by the Employer's attorney, signed by him and dated September 18, stated:

> I am an attorney-at-law licensed to practice in the States of New York and New Jersey. On September 6, 1996, I served the within subpoena returnable on September 13, 1996, by mailing same by certified mail, return receipt requested in a sealed envelope with postage prepaid thereon, by depositing same in a[n] official depository of the U.S. Postal Service within the State of New Jersey, to the last known address of the person named below: Sartaj Khan.

The document then specified the address to which the subpoena had been mailed.

Consistent with the attorney's affirmation, the Employer's counsel had stated on the record at the September 13 hearing that a subpoena had been mailed to Khan on September 6 by certified mail, return receipt requested, but that no postal return receipt card had been received at that time.

[7] The Regional Director noted that the Employer had submitted the postal return receipt card for the subpoena mailed to Shah.

of service by an attorney as proof of service. See, e.g., *I.C.C. v. Carpenter,* 648 F.2d 919, 921 (3d Cir. 1981) (court accepts attorney's certificate of service attached to motion as proof of service); *Keal v. Monarch Life Insurance Co.,* 126 F.R.D. 567, 568 (D. Kan. 1989) (certificate of counsel or affidavit sufficient to prove service). Likewise, the Board has found that an affidavit of service is sufficient to prove service by mail, notwithstanding the absence of a postal return receipt card. *Electrical Workers IBEW Local 11 (Anco Electrical),* 273 NLRB 183, 191 (1984).[8]

Contrary to the Regional Director, it is immaterial that the Employer did not timely submit the postal return receipt card.[9] While the receipt card would, of course, have been acceptable as proof of service, Section 102.113(e) explicitly provides:

> In the case of service by mail or telegraph, the return post office receipt or telegraph receipt therefor when registered or certified and mailed or when telegraphed shall be proof of service of the same. *However, these methods of proof of service are not exclusive; any sufficient proof may be relied upon to establish service.* [Emphasis added.]

Thus, it is evident from the plain language of the Board's Rules and Regulations that service may be proved without submission of the postal return receipt card. See also *Electrical Workers IBEW Local 11 (Anco Electrical),* supra, 273 NLRB at 191 (postal return receipt card not required to prove service).

It is also immaterial that the Employer has not established that Khan actually received the subpoena. Section 102.113(c) of the Board's Rules and Regulations provides that a subpoena may be served by personal delivery **or** "by registered or certified mail." Where, as here, service by mail is authorized, service is effective when the document is mailed. *National Automatic Sprinkler,* 307 NLRB 481 fn. 1 (1992). Accord: *Keal v. Monarch Life Insurance Co.,* supra, 126 F.R.D. at 568. See also Fed. Rule Civ. Proc. 5(b) ("service by mail is effective upon mailing"). Accordingly, because service of the Khan subpoena was effective when it was mailed, proof that it was mailed is sufficient to prove service.

For the reasons set forth above, the attorney's affirmation of service was sufficient to establish service of the subpoena. We shall therefore remand the case to the Regional Director for institution of subpoena enforcement proceedings, pursuant to Section 102.31(d) of the Board's Rules and Regulations, with respect to the subpoena served on Khan on September 6, 1996, and for the issuance of a supplemental decision on objections.[10] Following the service of the supplemental decision, the provisions of Section 102.69 of the Board's Rules and Regulations shall apply.

ORDER

IT IS ORDERED THAT this proceeding is remanded to the Regional Director for Region 29 for further proceedings consistent with this Decision and Order Remanding.

---

[8] In *Anco*, the names of the Board agents responsible for service and the notary public were typed, and were not the original signatures; however, the affidavit of service, unlike that here, was sworn and notarized. The Federal courts have found that an attorney's unsworn certification of service, such as the one at issue here, is sufficient to prove service. As the Fourth Circuit has observed,

> In the absence of any statutory requirement as to the form of proof and of any objection at the trial to the acceptance of the attorney's certificate of mailing as sufficient, we are of the opinion that the judge was justified in this case in accepting the certificate as proof of the service. The addition of an affidavit would perhaps have given a greater appearance of formality, but it would have added nothing to the effect of the certificate since it would constitute merely a voluntary act of the affiant; and the absence of the affidavit did not absolve the certifier from the criminal sanctions applicable to one who corruptly obstructs the administration of justice in the federal courts.

Timmons v. United States, 194 F.2d 357, 361 (4th Cir. 1952), cert. denied 344 U.S. 844 (1952), rehearing denied 344 U.S. 882 (1952) (unsworn attorney's certificate of mailing suffices as proof of service of papers and pleadings). Accordingly, we find that the affirmation of service submitted by the Employer is sufficient proof of service under the circumstances of this case.

[9] The Employer attached to its exceptions and brief filed with the Board documents which appear to be copies of the postal return receipt card and envelope addressed to Khan. However, the Employer has not excepted to the Regional Director's finding that these documents were not submitted to the Region at the time the Employer requested that contempt proceedings be instituted. The Employer also has not explained its failure to submit the documents in a timely fashion. Accordingly, we do not rely on these documents as evidence that the subpoena was served on Khan.

[10] Sec. 102.31(d) of the Board's Rules and Regulations provides that

> [u]pon the failure of any person to comply with a subpoena issued upon the request of a private party, the General Counsel shall in the name of the Board but on relation of such private party, institute proceedings in the appropriate district court for the enforcement thereof, unless in the judgment of the Board the enforcement of such subpoena would be inconsistent with law and with the policies of the Act. Neither the General Counsel nor the Board shall be deemed thereby to have assumed responsibility for the effective prosecution of the same before the court.

We need not pass on the Employer's remaining contentions pending resolution of this issue.